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In the Supreme Court of the United States

October Term, 1969

No. 1385

[illegible] et al.,
Appellants,

vs.

[illegible] et al.,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

Reply Brief in Support of Motion of Appellee [illegible] Lehtinen to Dismiss or Affirm

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San Francisco, California

In the Supreme Court of the United States

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No. 1385

Reynald Hutchinson, et al., *Appellants*,	
vs.	
Laurie Lehtin, et al., *Appellees*.	

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Reply Brief in Support of Motion of Appellee Laurie Lehtin to Dismiss or Affirm

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Appellants' Jurisdictional Point: Distinction between the issue of mootness and the issue of lack of jurisdiction.

In response to the question of mootness, appellants reply that if the issue of injunctive relief is moot, the issue of declaratory relief seeking a declaration of unconstitutionality of California statutes is not. But this Court has no jurisdiction of a case appealed from a three-judge [illegible] seeking an interlocutory declaratory relief [illegible] 28 U.S.C. § 1253. Dept. of Int. v. [illegible] 395 U.S. [illegible] (1969). Jurisdiction can be provided only by successfully maintaining the

denial of an injunction. But any denial of an injunction against termination of possession is moot because all appellants had vacated the premises before the judgment.

Moreover, the issue of declaratory relief was moot because appellants, having vacated the premises, no longer had a controversy with the landlord giving them a standing to obtain an abstract declaration about constitutionality of California legislation.

With respect to mootness appellants also assert that they did not voluntarily vacate but did so in anticipation of enforcement of the Municipal Court judgments for possession. To this there are two answers. First, voluntariness is irrelevant to mootness. Whatever the reason for vacating, there was nothing left upon which an injunction could thereafter operate. *Richardson v. Schwartz*, 261 U.S. 210, 218 (1923).* Second, the statement about voluntariness is neither correct nor supported by the record. The "Affidavit in Support of Temporary Restraining Order" filed by appellants in the court below the very day the restraining order issued states (¶ 5): "These plaintiffs are presently without any way to prevent such evictions within the California courts"; this was a representation under oath that they were still in possession and that possession was protected by the restraining order until the preliminary injunction was denied, by which time they had vacated.

Appellants also seek to avoid mootness by arguing that appellants sought an injunction not only against enforcement of the judgment for possession but also against enforcement of the money judgments for unpaid back rent. Granted, etc. No time

*Richardson v. Schwartz. It is urged that the permit was issued by the Inspector of Buildings only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobedience. The source of the effect, so far as the petition is concerned, is quite immaterial. We are concerned only to be satisfied that the action complained of has not been nullified by the acts of the petitioner.

of obligation to pay back rent, was presented below. The order to show cause presented by appellants to the court below in their application for a preliminary injunction said nothing about unpaid rent; it merely directed that appellee should show cause why a preliminary injunction should not be issued, enjoining defendants Laurie Leitner and Frank O. Madigan from evicting the named plaintiffs and why the declaratory relief prayed for in the complaint should not be granted. The temporary restraining order issued below did not restrain appellee from enforcing the money judgments, it restrained them from evicting the above-named plaintiffs until such time as this complaint for a preliminary and permanent injunction is heard and determined by a three-judge district court. And it is understandable why appellants did not seek below to raise any constitutional question about the judgments to pay unpaid rent. Any contention that the Fourteenth Amendment confers rent-free leases on a tenant in the event of a dispute over arrears of maintenance would be, we submit, frivolous.

Appellants assert (Reply Br. p. 13) that the central, in the opinion below, that "this is a class action" should be deemed tantamount to a determination under F.R.C.P. Rule 23 that it may be maintained as a class action. We need not pause over that erroneous statement[*] because it is refuted by the record.

Appellants' motion was for a preliminary injunction that would only affect the named plaintiffs. No relief on behalf of the class was sought at the hearing. No other words, no motion was made on behalf of a class, and there can't be jurisdiction in lieu of a direct appeal is confined to the grant or denial of an injunction.

With respect to lack of jurisdiction of the court below to hear a lateral appeal from the state court (Brown v. Fidelity Trust Co., 295 U.S. 672 and 676 (1934)), appellants cite the decision

* Appellants cite (Reply Br. p. 13) that the central issue pertinent to the case was first presented to the district court. * * * Moreover, there could not have been a determination that a class action was maintainable

tional issues were not present in the state cases is puzzling.* The constitutional issue is whether refusal of the state court to hear certain defenses violated the Fourteenth Amendment. Appellants urged the state court to hear the defenses upon constitutional grounds. That issue was available for presentation in the state courts, both in the court of first instance and on appeal through the state hierarchy, and then to this Court. Whether phrased there in the precise words used here, it cannot be collaterally raised now. An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised. *Angel v. Bullington*, 330 U.S. 183, 186 (1947).

There are two separate appeals here, one from the denial of preliminary injunction of January 5, 1970, and one from the final judgment of March 30, 1970. Our motion to dismiss is directed to each. We respectfully submit that each should be dismissed.

Dated, May 12, 1970.

Respectfully submitted,

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* Appellants argument that they have joined as defendants the district and a state judge is irrelevant. In Mooney the participants were added as defendants who were not in the case.